BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 659

PUBLIC PARTICIPATION IN CLASS EXEMPTION PROCEEDINGS

216550

COMMENTS OF THE STATE OF NEW JERSEY

In accordance with the Notice of Proposed Rulemaking (NPRM) issued in the above-referenced docket, the State of New Jersey ("the State") hereby submits its comments regarding the Board's proposal to modify the timeframes in certain types of proceedings in order to provide greater public notice in advance of the effective date of an exempted transaction.

I. The State of New Jersey Supports the Proposal

In the NPRM, the Board has proposed changes to the notice periods and effective dates applicable to ten different types of class exemptions (the "Ten Exemption Transaction Types") created by the Board and its predecessor agency, the Interstate Commerce Commission ("ICC"). As set forth in more detail below, the State supports the proposed changes as a much needed step to ensure that communities, governmental agencies, and other persons affected by these types of transactions will be accorded sufficient time to consider the impact and effects of the proposed transaction. In addition, the State believes the proposed changes will help to reduce the possibility that the class exemption procedure will be abused in the future.

Currently, the Board's regulations provide that exemptions will become effective 7 calendar days after the applicant files its Notice of Exemption with the Board, even though official notice to

the public is not published in the *Federal Register* for 30 days in most instances. As a result, these transactions are permitted to go into effect well before the public has been deemed to have been given notice in the *Federal Register*.

Although the Board has not indicated the reason for the initiation of this rulemaking, the State assumes that a contributing factor may be the recent instances in which parties appear to have attempted to misuse the provisions, for example, of 49 C.F.R. § 1150.31 *et seq.* in creating what are claimed to be Class III rail carriers. In a growing number of cases, putative railroad operators have filed Notices of Exemption without providing actual notice of their intentions to parties likely to be directly impacted by the proposed operations - - such as connecting carriers, landlords, local communities, and state or federal environmental agencies. In at least some of these cases, the failure to notify clearly interested parties appears to be motivated by a desire to have the Notices of Exemption become effective "under the radar," so that the alleged railroad status of the operator can be used to claim that local zoning regulations, land use plans, and federal and state environmental health and safety regulations are preempted and unenforceable under 49 U.S.C. § 10501(b).

As the Board has implicitly recognized, the existing regulations tend to encourage these attempts to "game" the system, since there is often insufficient time under the existing regulations to mount a challenge before the expiration of the 7 day period. Unless the filing party voluntarily elects to provide actual notice of its intentions to affected parties, the current regulatory procedure provides at best a few days notice to interpose objections with the Board prior to the effectiveness of an exemption. More typically, the 7 day period expires before state agencies, local communities and other potentially affected persons even discover that a Notice of Exemption has been filed.

A listing of just a few of the recent numerous proceedings that have been instituted by Notice

of Exemption filings under 49 C.F.R. § 1150.33 demonstrates the significance of the issue. In some instances, an affected party was somehow alerted to the filing and persuaded the filer to postpone the effective date and/or withdraw the Notice to avoid a formal challenge. *See, e.g.*, F.D. No. 34819, *Commercial Rail Services, Inc. - - Operation Exemption - - Providence and Worcester Railroad* (decision served January 25, 2006; not published)(filing party ultimately withdrew the Notice of Exemption after having its effectiveness voluntarily postponed); F.D. No. 34548, *Rhode Island & Western Railroad LLC - - Lease and Operation of Exemption - - Pawtucket Transfer Operations LLC* (decision served October 8, 2004; not published)(notice voluntarily withdrawn temporarily for asserted purposed of resolving lease and operating issues; never refiled).

In other instances, an affected party found out about the filing, asked the Board to order a stay of the effective date of the Notice of Exemption so as to obtain further information concerning the bona fides of the proposed operation. F.D. No 34392, *New Jersey Rail Carrier, LLC - - Acquisition and Operation Exemption - - Former Columbia Terminals, Kearny, NJ* (decision served January 28, 2004; not published)(exemption ultimately allowed to go into effect after filer demonstrated that it was not attempting to circumvent the state's environmental health and safety regulations).

In other instances, the filing party voluntarily withdrew the Notice of Exemption when challenged by some other party either before or after it had become effective. F.D. 34853, *Doremus Ave Recycling and Transfer, LLC - - Operation Exemption* (decision servicd April 3, 2006; not published)(notice withdrawn after Consolidated Rail Corporation challenged filer's status as a bona fide common carrier by rail); F.D. No. 34281, *LB Railco, Inc. - - Lease and Operation Exemption - - Providence and Worcester Railroad Company* (decision served May 1, 2003 (filer withdrew notice after petitions to revoke the exemption had been filed by the Massachusetts Department of

Environmental Regulation and other affected parties).

The State agrees that the procedural issue relating to the 7 day notice period needs to be reexamined, particularly with respect to situations involving the creation of a new railroad service. Where rail service already exists, local communities and other parties are already aware of those activities and may have little cause for concern simply because the service is being transferred to a new operator. On the other hand, when a new rail carrier and a new service are being created, many parties will be affected in various ways and they will often need a period of time to understand what changes are likely to occur and how those changes might impact their interests. If notice of the new operations comes too late, the affected party today bears the heavy burden of demonstrating that the Notice of Exemption contained false or misleading information or that there is a substantive basis for revoking the exemption using the procedures in 49 C.F.R. Part 1121. This is not the situation the ICC contemplated when the class exemption for acquiring or operating new Class III rail lines was promulgated.

To the contrary, it is clear that the ICC was focused on the need to keep existing rail service in place, and did not contemplate the situation where new "rail carriers" are being created primarily to avoid state and local regulation of activities, rather than to provide a legitimate rail service to the public. In rejecting concerns expressed by a few States about a shortened time period for comments about such exemptions, the ICC concluded that shippers, local communities and state agencies were more interested in preserving rail service, rarely opposed individual exemptions, and typically already had actual notice of such transactions before they were filed. *Class Exemption - - Acq. & Oper. Of R. Lines under 49 U.S.C. 10901,* 1 I.C.C. 2d 810, 816 (1985), *aff'd Illinois Commerce Comm'n v. ICC,* 817 F.2d 145 (D.C. Cir. 1987). But the factual predicate upon which the ICC relied

in reaching those conclusions has changed, and many of these exempted transactions today have nothing to do with preserving existing rail service. As a result, many of these transactions are of considerable concern to local communities, state regulatory agencies, and even connecting rail carriers and frequently raise questions about whether the Board's procedures are being misused in an attempt to insulate non-rail carrier activities from essential, legitimate oversight by state environmental and health and safety agencies.

Consequently, the State agrees that the applicable regulations should be modified so that any exemptions under the Ten Exemption Transaction Types would not take effect until 30 days after the various Notices of Exemption are filed. And, if publication in the *Federal Register* does occur within the 16 day period contemplated in the NPRM, affected parties would have 7 days to file stay petitions, which may be a sufficient time to do so in most cases. However, and as noted in the following section, this procedure does not sufficiently address the problems facing States, local communities and other parties that are confronted with what are often "sham" rail carrier exemption filings.

II. The Board Should Amend The Regulations To Add Actual Notice Requirements

Although promulgation of the proposed rule would be a useful step in addressing a significant problem with the class exemption procedures, the contemplated change still relies too heavily on constructive, rather than actual, notice. While publication of a Notice of Exemption in the *Federal Register* is important for official notice purposes, it often will not suffice to provide affected communities, state agencies and other parties with timely notice that someone is proposing to create a new rail carrier and/or rail service. The State suspects that there are relatively few state agencies, local communities or other affected persons with the resources to monitor the *Federal*

Register daily in order to ascertain whether someone intends to commence rail operations in their community.

Even assuming that the proposed operations would be bona fide common carrier activities (which may not be the case in numerous instances), the creation of a new rail carrier - - even if a Class III - - will almost necessarily have a significant impact upon shippers, the local community and state regulatory agencies charged with jurisdiction over, *inter alia,* environmental, health and safety and transportation issues. Just as the Board's regulations require that existing rail carriers provide actual notice of their intention to abandon rail lines to shippers and specified governmental agencies, the regulations pertaining to the creation of new rail carriers should require the provision of actual notice of that proposal as well.

Under 49 C.F.R. §§ 1150.20 and 1105.7, rail carriers intending to seek approval to abandon all or part of their lines are required to provide advance notice to designated state clearinghouse agencies, state public service commissions, Governors, environmental protection and coastal zone management agencies, heads of each county in which the line in question will be abandoned, as well as a number of other enumerated individuals and agencies. While the State is not suggesting that the Board should require that all of the entities specified in the abandonment regulations receive actual notice of a filing to become, operate or control a carrier under the class exemptions, Notices of Exemptions should be required to be provided to at least those municipalities, local communities and state agencies that would be directly affected by the proposed activities.

The State accordingly recommends that the Board further amend its regulations in this proceeding - - or in an expanded rulemaking if additional notice and comment is deemed necessary - - to provide for actual service upon the following entities of any Notice of Exemption being filed

under the Ten Exemption Transaction Types:

1. The Governor of the State;

2. The State Environmental Protection Agency;

3. The State Coastal Zone Management Agency;

4. The State Clearinghouse agency;

5. The State Department of Transportation; and

6. The government for each county and the municipality in which the proposed rail carrier operations will be conducted.

A Notice should be provided to the above-described parties at the same time, if not earlier, that the Notice of Exemption is filed with the Board.

The State believes that promulgating this actual notice requirement would not unduly burden applicants or otherwise interfere with the legitimate use of the exemption process. In the first place, applicants have to file the Notice of Exemption with the Board anyway. Consequently, it is difficult to see why sending a copy of the Notice of Exemption to state and local entities by mail (and, of course, providing an appropriate certification that the document was appropriately served) would significantly increase the regulatory burden on such an applicant. And, as the Board's abandonment regulations require that actual notice be given to an even longer list of potentially affected entities (*see* 49 C.F.R. § 1152.20), a requirement of this nature is not unusual.

Since the state and local entities listed above would undoubtedly have an interest in knowing about the inception of rail carrier activities, and as the Board is clearly and appropriately concerned that the notice process not be illusory, this additional step can not reasonably be seen as being any type of barrier to use of the exemption procedures. Moreover, just as there is a clear policy to

minimize regulatory burdens on rail carriers, Congress has also made it clear that rail transportation facilities should be operated "without detriment to the public health and safety." 49 U.S.C. § 10101(8). Amending the regulations so that responsible state and local officials are appropriately informed about activities that might have a significant adverse affect on public health and safety would clearly implement the Congressional rail transportation policy.

III. The Board Needs Additional Information From Applicants

A significant issue confronting the State and environmental and health and safety agencies, as well as the legitimate rail industry itself, is the relatively recent problem caused by the proliferation of sham railroads. The Board has recognized this issue, having been confronted with a number of specious or patently fictitious "rail carriers," whose motivation for existence is to misuse the preemption provision of 49 U.S.C. § 10501(b) in order to try to evade legitimate state and local oversight of solid waste handling activities.

The poster child for this phenomenon is the *Hi Tech* case, in which a solid waste operator sought to shield its operations from environmental and health and safety regulations by claiming the protection of preemption under 49 U.S.C. § 10501. During the course of years of litigation at the Board and before the courts, the operator likely garnered large profits from unlawful, unlicensed and unregulated activities that had little to do with rail carrier transportation. *See, e.g.*, F.D. No. 34192, *Hi Tech Trans, LLC - - Petition for Declaratory Order - - Newark, NJ* (decision served August 14, 2003). In bringing the curtain down on Hi Tech's shifting attempts to be either a rail carrier or an agent of one conducting activities that were allegedly integral to rail transportation, the Board observed:

> Hi Tech is not a licensed rail carrier. There are formal procedures that must

> be followed to obtain authority as a rail carrier from the Board. *See* 49 U.S.C. 10901. Even if such procedures are followed, the Board will not approve rail carrier authority that is a sham or intended solely to avoid local regulations.

Id., at 6 n. 12. *See* also *LB Railco, supra*, and F.D. No. 34735, *Northeast Interchange Railway, LLC – Lease and Operation Exemption – Line in Croton and Hudson, NY* (decision served November 17, 2005; not published)(Board rejected the notice due to evidence that it was a sham railroad) for examples of attempts to abuse the Board's processes and the preemption provision to avoid legitimate and essential regulatory oversight by responsible environmental and health and safety agencies.

These are only a few examples of what is a growing problem. More and more, the exemption procedures are being invoked by persons that do not appear to intend to operate as legitimate rail carriers. It appears that the primary purpose for attaining rail carrier status in many instances is often to enable the operator to circumvent local zoning and permitting requirements in operating as a solid waste transfer facility. The operators of such enterprises seek to avoid - - or at least temporarily fend off - - environmental, health and safety oversight, using 49 U.S.C. § 10501(b) combined with the threat of costly and burdensome litigation against those who might challenge the assertion of rail carrier status and federal preemption. Similarly, such filings have on occasion been intended to accomplish other, non-rail carrier goals, such as avoiding condemnation proceedings, applying for state or federal grant monies, etc.

In many situations, the putative rail carrier clearly does not intend to operate as a bona fide rail carrier. Typically, in those instances where a proceeding is instituted and discovery is obtained, it becomes obvious that the entity in question does not intend to own or actually operate any

locomotives; provide rail cars; hire engineers, trainmen, maintenance of way personnel or other railroad operating, clerical or management employees; provide rail clerical and waybilling service; interface with the IT networks of other rail carriers; or engage anyone with any real experience in actually providing rail service. Nor is it clear that such entities will be able to enter into interchange or division agreements with the railroads with whom they ostensibly "connect."

It is often the case that the only connection these solid waste entities have with real railroads is that their solid waste facilities, which can be remarkably lucrative when not subject to regulatory oversight, are situated on what had previously been private industrial property containing a small amount of track. Once the rail carrier exemption is obtained, however, the operator can be expected to argue that its activities have been bootstrapped into those of a rail carrier transload operation, and are thus subject to the protection of 49 U.S.C. § 10501(b). Indeed, that is the precise argument Hi Tech made and that is presently being made in a number of other situations that confront the State and state agencies around the country.

Part of the difficulty here is that the class exemption provisions are often now being used for a purpose that was not contemplated. When the ICC promulgated these regulations, the primary purpose was to provide for an expedited procedure that would ensure the continuation of already existing rail service or to restore rail service to lines that had previously been abandoned. *Class Exemption*, 1 I.C.C. 2d at 810. The class exemption procedures were not intended for use in creating a rail carrier where no service has previously existed or for converting purely private activities to rail common carrier operations.

One way to alleviate this problem would be for the Board to amend the class exemption regulations and restrict their application so that they conform to the originally intended purpose - -

namely, to facilitate the transfer or restoration of bona fide rail common carrier service. To the extent that a would-be rail carrier intends to operate along lines that never were part of the general system of railroad, those parties should be required to file an application under the normal procedures of 49 U.S.C. § 10901 or otherwise petition for exemption from those requirements in accordance with 49 C.F.R. Part 1121. In that way, applicants would have the opportunity to demonstrate that they intend to be bona fide rail carriers.[1] To the extent affected parties agreed or disagreed with such applications or petitions, there would then be an appropriate mechanism for the Board to make affirmative findings upon a factual record.

The existing regulations provide for little opportunity for anyone to ascertain whether the applicant is likely to be a bona fide rail carrier in instances where a new service is being contemplated to operate over tracks that neither were nor are presently part of the general system of railroads. Nor is it possible to discern from the Notice filings what effect, if any, the proposed operations will have on the environment or the health and safety of the local communities. At present, the filing entity need only describe in general terms the nature of the transaction *(i.e.*, is it to acquire, operate or both), describe the mileposts involved,[2] state the number of route miles[3] and

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[1]This is the procedure that has been followed by New England Transrail ("NET") once it withdrew the Notice of Exemption it originally filed in the pending proceeding in F.D. No. 34797, *New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway - - Construction, Acquisition and Operation Exemption - - In Wilmington and Woburn, MA.*

[2]Often there are no milepost designations, as the property involves only industrial yard.

[3]In these situations, the "route miles" typically consist of track measured in the hundreds or low thousands of feet; moreover, rarely does the track meet FRA track class standards required for moving freight trains, as the contemplated service rarely contemplates more than the use of trackmobiles or switcher engines to move individual cars around on what is typical industry property.

provide a map.[4] While this may be sufficient when the issue involves the continuation or restoration of service on what had previously been an actual line of a rail common carrier, it provides little help to either the Board or interested parties in both discerning the true nature of the proposed operations where no rail services has previously been provided and responding to any issues that arise from the contemplated activities.

Accordingly, the State suggests that the Board amend the regulations, either in this proceeding or in a separate proceeding if notice and comment for these changes is necessary, so as to provide (1) that the Ten Exemption Transaction Types are only applicable to transactions involving the preservation or restoration of rail common carrier service, and (2) to require that applicants provide more detailed information when seeking to commence service over track that has not previously been part of the national rail system. The additional information requirements would include:

1. A concise discussion of the contemplated arrangements, the shippers and/or industries to be served, whether the applicant is affiliated with or has a financial or other interest in a shipper that would be tendering commodities for transportation, whether the applicant intends to handle solid or other waste shipments, and why a certificate of public convenience and necessity or exemption to operate as a rail common carrier is required or appropriate;

2. An operating plan, including a description of the type and volume of traffic that is expected to move, the nature of the equipment and crews that will be used, the applicant's operating experience, whether applicant intends to provide rail cars and a description of the track being

[4]Again, in these situations the map normally consists of a hand drawn line superimposed upon a plat or diagram showing the dimensions of the industry property that has been leased.

acquired together with any planned construction and/or rehabilitation and improvements;

3. A description of the status of discussions between the applicant and connecting carriers relative to entering into interchange agreements;

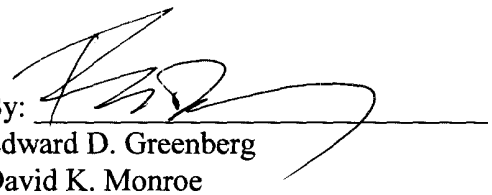
4. Financial information, including projected net income from rail operations for the next 2 years; and

5. In the event applicant will be constructing rail lines or rail transportation facilities, a description of steps that will be taken to mitigate any adverse affect of the construction and operation on the environment and the public health and safety of local communities.

The State does not believe that the preparation and submission of such information would be burdensome, as none of the information listed above should require an applicant to produce data that it would not likely already have generated or which is not otherwise clearly relevant for an evaluation of the proposal. And, since this information would only be necessary in situations where the applicant would be providing a new service over lines that have not previously been part of the national rail system, parties seeking to continue or resume rail service on existing lines would not need to submit such data.

In conclusion, the State supports the proposed modification of the class exemption rules as set forth in the NPRM. In addition, the State urges the Board to further modify the regulations so as to ensure that (1) directly affected parties receive actual, rather than constructive, notice of the proposed transaction, and (2) Notices of Exemption relating to the creation of new railroad service over lines that have not previously part of the general system of railroads provide additional substantive information about the nature of the transaction.

Respectfully submitted,



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